said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States Marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

The Court held that both the 4th and 5th Amendments to the Constitution were violated by the statute. In commenting on he same the Court in its opinion said:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution in all cases where a search and seizure would be; * * *.

"We have already noticed the intimate relation between the two amendments (4th and 5th). They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is a 'criminal search and seizure' within the meaning of the Fourth Amendment. And we have been

unable to perceive that the seizures of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

The Court said:

"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the District attorney of said invoice, when produced in obedience to said notice, and submission in evidence by the Court, were erroneous and unconstitutional proceedings."

Boyd v. *U. S.*, 116 U. S. 616, 29 L. ed. 746.

The test of whether an order for the production of documents constitutes an unreasonable search in violation of the 4th Amendment is clearly stated in the opinion of the Court in *McMann* v. *Securities and Exchange Commission* (1937), 87 F. (2d), 377. While in that case the Court sustained the validity of an order for the production of documents, it stated thus:

"No doubt a subpoena may be so onerous as to constitute an unreasonable search. * * * The search is 'unreasonable' only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds. The investigation at bar was no such fishing excursion; it was limited to transactions in two companies as to which the commission had some evidence of violations of the statute. The documents demanded were few and their production did not interfere with the business of Engell and Company."

McMann v. *Securities and Exchange Commission*, 87 F. (2d) 377.

Measured by the standard laid down in the last cited case (*McMann* v. *Securities and Exchange Commission*, *supra*), the subpoena duces tecum and the requirements of the judg-

ment appealed from in the case at bar constituted an unreasonable search, in that the documents called for were estimated at twenty thousand in number; the scope of the call was out of all proportion to the end sought; the documents called for were to be used in a contemplated exploratory investigation, the purposes and limits of which to be determined only as such exploratory investigation progressed; the proposed investigation was precisely the sort which was designated in the last cited case as a "fishing excursion."

3.

The Judgment was Erroneous Because It Required the Production of Too Many Documents in Too Short a Time.

The judgment required the defendant in the lower Court (the petitioner herein), either to permit the inspection and copying of the vast number of invoices hereinbefore specified, by a representative of the plaintiff's office at the place of business where such records were kept during the ordinary business hours of the day, or else to produce the documents on or before the 33rd day after the entry of such judgment. To comply with this judgment would have required, and would still require the defendant, against whom the judgment was directed, either to labor for the large number of hours and days which the record shows a compliance with the judgment would require without compensation being provided therefor, or else, to employ a clerk to do the same thing, with no provision for defendant's reimbursement; or, otherwise, compliance would require the defendant to furnish, without compensation therefor, office space or facilities, for the inspection and copying of the said records by the plaintiff, thus depriving the defendant of property without due process of law.

4.

No Charge of Violation of Law or Regulation was Pending Against the Defendant in the Lower Court, or Against His Corporation When the Judgment was Entered.

An examination of the leading cases wherein similar issues have been presented to this Court discloses that the demand for the production or inspection of records is usually made in connection with some criminal action, civil suit, or administrative investigation. Thus, in *Brown* v. *U. S.*, 276 U. S., 134, 72 L. ed. 500; *Wheeler* v. *U. S.*, 226 U. S., 478, 57 L. ed. 309; *Consolidated Rendering Company* v. *Vermont*, 207 U. S. 541, 52 L. ed. 327, the subpoena duces tecum, in each case, called for the production of documents before a Grand Jury. In *Nelson* v. *U. S.*, 201 U. S. 92, 50 L. ed., 673, the subpoena required the production of documents before a Special Master, in a pending suit which had been brought by the United States. But in the case at bar the primary purpose of the inspection of the records is the inspection. It is not claimed that the contents of the invoices referred to in this case are evidence or are believed to be evidence in any pending proceeding. Therefore, the investigation seems to fall within the category condemned in the case of *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 68th L. ed. 696, hereinbefore cited.

CONCLUSION.

In conclusion, it is respectfully submitted that this Court should grant a Writ of Certiorari to the end that the aforementioned judgment entered in this cause against your petitioner, in the United States Court of Appeals for the District of Columbia, may be reviewed and reversed by this Court.

Respectfully submitted,

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